Petition

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81-975

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES K. J. CHENG,

Petitioner,

—against—

GAF CORPORATION,

Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Where defendant's small law firm was disqualified by the United States Court of Appeals for the Second Circuit, for the unethical practice of hiring an attorney from the office of plaintiff's attorney; and where that attorney had direct knowledge of, and contact with plaintiff; and where such order of disqualification was reversed and remanded on purely procedural grounds by this Court:

I

Was it error for the Second Circuit to refuse to Mandamus the District Court to follow the Second Circuit's own holding of disqualification in this case when such a procedure was prescribed by this Court in footnote 13 of Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981)?

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	1
Jurisdiction	2
Statement of the Case	2
REASONS FOR GRANTING THE WRIT	5
I. Mandamus Should Issue To Compel Disqualification of an Unethical Law Firm When There is Clear Danger of Tainting the Trial and a Clear Permanent Judicial Finding of Disqualifying Unethical Conduct.	5
CONCLUSION	10

Page

APPENDIX A A-1

Order of the Court of Appeals for the Second Circuit dated September 29, 1981

APPENDIX B A-3

Order of the District Court for the Southern District of New York dated July 1, 1981

APPENDIX C A-4

Decision of the Court of Appeals for the Second Circuit dated August 26, 1980

APPENDIX D A-18

Pertinent Excerpts of the Relevant Decision of the United States District Court dated April 28, 1981

APPENDIX E A-20

Pertinent Excerpts of the Relevant Decision of the Court of Appeals for the Second Circuit dated July 6, 1981

TABLE OF AUTHORITIES

Cases:	Page
Cheng v. GAF, 631 F.2d 1052 (2d Cir. 1980)	2, 4, 5, 7, 9
Dairy Queen v. Wood, 369 US 469 (1962)	6
Ex Parte Republic of Peru, 318 US 578 (1943)	6
Firestone Tire & Rubber Co. v. Risjord, 449 US 368 (1981)	i, 4, 5
Glueks v. Logan, ___ F.2d ___, 80-1508, 2d Cir. July 6, 1981	7
In Re Halkin, 598 F.2d 176 (D.C. Cir. 1979)	6
La Buy v. Howes Leather Co., 352 US 249, 256 (1957)	6
United Stated Alkali Export Association v. United States, 325 US 196 (1945)	6
Yaretsky v. Blum, 76 Civ. 3368 (S.D.N.Y.) April 28, 1981	9

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner James K.J. Cheng ("Mr. Cheng") prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in this case on September 29, 1981.

Opinions Below

The order of the Court of Appeals for the Second Circuit has not been officially reported and is set forth at Appendix A herein. The order of the District Court for the Southern District of New York, dated July 1, 1981, is not reported and is set forth at Appendix B herein. A prior opinion by the Court of Appeals for the Second Circuit dated August 26, 1980 which is material to this petition for a writ of certiorari is set forth at

Appendix C herein and reported as Cheng v. GAF, 631 F.2d 1052 (2d Cir. 1980). Excerpts of other relevant decisions below are also appended as Appendixes D and E.

Jurisdiction

The order of the Court of Appeals for the Second Circuit was dated and entered on September 29, 1981. This petition for a writ of certiorari was filed within ninety days of this order. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statement of the Case

Legal Services for the Elderly Poor has represented Mr. James K.J. Cheng since early in 1976. From October 22, 1974 until October 19, 1979, Mr. Phillip Gassel was employed as a senior attorney with that office. Since Legal Services for the Elderly

is a small office with much interaction among its attorneys, Phillip Gassel was introduced to Mr. Cheng and talked with Mr. Cheng. Mr. Gassel also participated in several office discussions concerning the conduct of Mr. Cheng's case and was privy to confidential communications from him. In October, 1979 Mr. Gassel joined defendant's law firm.

After informal requests for disqualification were denied, Mr. Cheng moved to disqualify defendant's attorneys on February 22, 1980. This motion was denied on March 14, 1980. On appeal the Second Circuit reversed on August 26, 1980 for a number of compelling substantive reasons, including "both the danger of tainting the underlying trial and the unacceptable

appearance of impropriety condemned in Canon 9." (Emphasis added). Cheng v. GAF Corporation, 611 F.2d 1052 (2nd Cir., 1980) at 1059. This reversal was vacated by the Supreme Court solely on procedural grounds (enunciated subsequent to the Second Circuit decision) in the case of Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368 (1981). The motion to disqualify the defendant's law firm was renewed in the District Court on June 12, 1981 and denied on July 1, 1981 (Appendix B). A Petition for Writ of Mandamus was filed on July 30, 1981 to compel the District Court to follow the holding by the Second Circuit to disqualify the defendant's law firm (as suggested by footnote 13 of Firestone Tire & Rubber Co. v. Risjord, supra.) The Court's attention was also directed to the fact that the same law firm had been disqualified in another

case after the decision in Cheng v. GAF, supra because the same lawyer had switched sides (Appendix D); and that decision was good substantive precedent in the Circuit. (Appendix E). The Petition for a Writ of Mandamus was denied on September 29, 1981. (Appendix A).

REASONS FOR GRANTING THE WRIT

I

MANDAMUS SHOULD ISSUE TO COMPEL DISQUALIFICATION OF AN UNETHICAL LAW FIRM WHEN THERE IS CLEAR DANGER OF TAINTING THE TRIAL AND A CLEAR PERMANENT JUDICIAL FINDING OF DISQUALIFYING UNETHICAL CONDUCT.

In Firestone Tire & Rubber Co. v. Risjord, 449 U.S. at 378-9, Footnote 13, this Court delineated the procedure for compelling disqualification before an appeal at the termination of the District Court proceedings.

> Ultimately, if dissatisfied with the result in the District Court

> and absolutely determined that it will be harmed irreparably, a party may seek to have the question certified for interlocutory appellate review pursuant to 28 U.S.C. §1292(b), see n 7, supra, and, in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals might be available. (Emphasis added).

Mr. Cheng urges this Court to grant his Petition for Certiorari and direct that Mandamus issue to give concrete illustration and guidance concerning the practical application of footnote thirteen and obtain justice for himself and instructions to lower Federal Courts as to the utilization of Mandamus in disqualification cases.*

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* This court gave similar guidance concerning Mandamus in La Buy v. Howes Leather Co., 352 US 249, 256 (1957). See also, United States Alkali Export Association v. United States, 325 US 196 (1945); Ex Parte Republic of Peru, 318 US 578 (1943); Dairy Queen v. Wood, 369 US 469 (1962). See in lower courts, In Re Halkin, 598 F.2d 176 (D.C. Cir. 1979) footnotes 57 and 58 for a survey of some uses of Mandamus.

A clearer case for disqualification cannot be imagined:

(1) The Second Circuit has found that the unethical conduct present in this case should disqualify defendant's law firm. In particular, it held that there was "danger of tainting the underlying trial." Cheng v. GAF, supra, at 1059. The firm was disqualified under both Disciplinary Rule 5-105(D) (at 1058) and Canons 4, 5, and 9. The denial of the Motion to Disqualify by the District Court was held to be "an abuse of discretion", Cheng v. GAF Corporation, supra at 1059. This decision has been recognized as having continued full vitality even after it was "vacated on other grounds and remanded." See Glueks v. Logan, ___ F.2d __, 80-1508, 2d Cir., July 6, 1981. (Appendix E). With this clear judicial holding governing the case, it was clearly

an egregious abuse of discretion for the District Court to deny the renewed Motion to Disqualify. That abuse of discretion should have been corrected by Mandamus. Petitioner is presently in the anomalous position of seeing the Court of Appeals decision on disqualification applied as controlling precedent in every case but his own and asks this court to correct this anomaly and injustice.

(2) The facts present overwhelming evidence that the firm should be disqualified. Although persuasive individually and compelling cumulatively for disqualification, they need not be invoked at this time as the Second Circuit's findings and recitation of selected facts present a powerful picture of unethical conduct. The "abuse of discretion" the Second Circuit found in denying the Motion to Disqualify would have predicated Mandamus at <u>that</u> time. It can do no less now.

We also should like to bring to this Court's attention as we did below, that subsequent to Cheng v. GAF, the defendant's law firm was disqualified in another case since the same lawyer had once again switched sides. Yaretsky v. Blum, 76 Civ. 3368 (S.D.N.Y) April 28, 1981 (Appendix D), stating among the many reasons for disqualification:

> This court would be hard pressed to explain to a lay person how it was in fact proper for a lawyer who was substantially involved with the prosecution of a lawsuit to switch sides in the middle of the action.

Thus the substantive law requires disqualification and Mandamus by the supervisory court to compel such disqualification.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Second Circuit in this case.

Dated: November 10, 1981

Respectfully submitted,

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APPENDICES

APPENDIX A

Order of the Court of Appeals
for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE:

JAMES K.J. CHENG, 81-3058

Petitioner

A petition for a writ of mandamus having been filed,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Further ordered that argument of

APPENDIX A

said petition be and it hereby is set for

Dated: September 29, 1981

/s/ James L. Oakes

/s/ Thomas J. Meskill

/s/ Dudley B. Bonsal

APPENDIX B
Order of the District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES K.J. CHENG,

Plaintiff,

- against -

GAF CORPORATION,

Defendant.

77 Civ. 3159 (RO)

[Transcribed handwritten endorsement]

Memorandum. The motion is denied without prejudice to its later renewal should it appear that "permitting continuing representation was [in fact] prejudicial" to plaintiff. Firestone Tire & Rubber Company v. Risjord, 49 U.S.L.W. 4089. (January 13, 1981) so ordered.

Dated: July 1, 1981

/s/
Richard Owen, U.S.D.J.

APPENDIX C

Opinion of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1199—September Term, 1979

(Argued May 19, 1980 Decided August 26, 1980)

Docket No. 80-7254

JAMES K. J. CHENG,

Plaintiff-Appellant,

v.

GAF CORPORATION,

Defendant-Appellee.

Before:

OAKES and MESKILL, *Circuit Judges,*
and BONSAL, *District Judge.**

Appeal from an order entered in the United States District Court for the Southern District of New York, Richard Owen, *Judge,* denying plaintiff's motion to disqualify defendant's law firm.

Reversed and remanded.

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* Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York, sitting by designation.

Appendix C

JONATHAN A. WEISS, Legal Services for the Elderly Poor, New York, New York (Kathleen L. Coles, Legal Services for the Elderly Poor, New York, New York, of counsel), *for Plaintiff-Appellant.*

ROBERT L. JAUVTIS, New York, New York (Epstein Becker Borsody & Green, New York, New York, of counsel), *for Defendant-Appellee.*

MESKILL, *Circuit Judge:*

James K. J. Cheng appeals from an order entered in the United States District Court for the Southern District of New York (Owen, *J.*) denying his motion to disqualify the law firm representing his opponent, GAF Corporation. Cheng argued below that because one of the attorneys employed by the law firm representing GAF previously had been employed by the legal services office representing Cheng, disqualification was necessary to avoid violations of various Canons of the American Bar Association Code of Professional Responsibility ("ABA Code"). The district court, concluding that disqualification was not warranted, denied Cheng's motion. For the reasons set forth below, we reverse the district court's decision and remand for entry of an order of disqualification.

BACKGROUND

In 1977, Cheng, represented by Legal Services for the Elderly Poor ("LSEP"), instituted an employment discrimination action against GAF. From the start, GAF has been represented in this litigation by the law firm of Epstein, Becker, Borsody & Green ("Epstein firm"). In October, 1979, while the *Cheng* case was still in the dis-

covery phase, the Epstein firm hired Philip Gassel as an associate in its health law department. From 1974 until his association with the Epstein firm, Gassel had been employed as a senior attorney at LSEP. Although Cheng concedes that while Gassel was employed at LSEP he did not represent Cheng in any litigation, Cheng claims that Gassel did participate in discussions with other members of the staff about the GAF case.

After learning of Gassel's new association, Cheng filed a motion to disqualify the Epstein firm from representing GAF in the instant case. Cheng alleged that the "continued participation of the Epstein firm . . . seriously jeopardizes the integrity of confidences and secrets of [Cheng] which were imparted to Mr. Gassel under the cloak of attorney-client relationship." Weiss Affidavit at 5. Citing the small size of the LSEP legal staff, which consisted of four to six attorneys working with several part-time students, and noting the frequency of cooperation and consultation among the LSEP attorneys, Cheng claimed that Gassel had actual knowledge of Cheng's confidences and secrets when he joined the Epstein firm. Cheng argued, therefore, that under Canons Four, Five and Nine of the ABA Code,[1] the Epstein firm should be disqualified.

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[1] The ABA Code consists of Canons which are "axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers." While the Ethical Considerations accompanying each Canon are "aspirational in character," the Disciplinary Rules keyed to each Canon "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Preliminary Statement, American Bar Association Code of Professional Responsibility.

Canon 4 states: "A Lawyer Should Preserve the Confidences and Secrets of a Client." Canon 5 provides: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client" and Canon 9 warns that: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."

Appendix C

Opposing the disqualification motion, the Epstein firm averred in its affidavits that Gassel had been hired as a health law attorney and had functioned only in that capacity, aside from handling some commercial litigation and miscellaneous matters. The Epstein firm emphasized that Gassel had not worked on the *Cheng* case, had not divulged any confidential information and would not be required to do so in the future. Gassel submitted an affidavit disclaiming any present involvement in the *Cheng* case and urging acceptance of the technique of insulation practiced by the Epstein firm.

In his opinion denying the disqualification motion, Judge Owen discussed Gassel's involvement in the *Cheng* case, and expressed the belief that Gassel possessed minimal confidential information, that he had not disclosed the information yet and that the Epstein firm had effectively screened him from the attorneys handling GAF's defense. Stating that the prejudice that would result from requiring GAF to change law firms after extensive discovery and trial preparation would be substantial, Judge Owen concluded that "to order disqualification under these circumstances would not serve any interest which the law recognizes." Because we disagree with Judge Owen's view of the effectiveness of the screening procedures employed by the Epstein firm, we reverse.[2]

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[2] After the filing of our decision in *Armstrong* v. *McAlpin*, slip op. 3693 (2d Cir. June 20, 1980) (en banc), the Epstein firm submitted a letter brief urging us to dismiss Cheng's appeal. In *Armstrong*, we held that "*henceforth* orders denying disqualification motions will not be appealable" Slip op. at 3697 (emphasis added). We do not regard that language as precluding us from reaching the merits of the instant appeal.

Some of the considerations which prompted us to reach the merits in the *Armstrong* case counsel us to do so in the instant appeal. *See Armstrong*, slip op. at 3711-13. Since this appeal was filed,

Appendix C

Discussion

It is well settled in this Circuit that a motion to disqualify an attorney is addressed to the discretion of the district court, and a ruling thereon will not be overturned absent a determination of abuse of discretion. *Hull* v. *Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975). *See also Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977); *Allegaert* v. *Perot*, 565 F.2d 246 (2d Cir. 1977); *W. T. Grant Co.* v. *Haines*, 531 F.2d 671 (2d Cir. 1976). The question raised in this appeal is whether Judge Owen's refusal to disqualify the Epstein firm was such an abuse.

I. *Disqualification Under Canon 4*

The American Bar Association Code of Professional Responsibility has been recognized in this Circuit as providing appropriate guidelines for proper professional behavior. *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, *supra*, 567 F.2d at 227 n.2; *NCK Organization Ltd.* v. *Bregman*, 542 F.2d 128, 129 n.2 (2d Cir. 1976); *Cinema 5, Ltd.* v. *Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976); *Hull* v. *Celanese Corp.*, *supra*, 513 F.2d at 571 n.12 *Cf. Arm-*

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briefed, argued, and considered prior to the filing of the *Armstrong* decision, our disposition of the appeal on the merits will neither crowd the appellate docket nor delay the litigation below. On the other hand, for us to dismiss the appeal at this stage would entail a needless waste of both judicial and private resources. Cheng's appeal was filed in full compliance and proper reliance on the pre-*Armstrong* law of this Circuit. The evils the *Armstrong* decision is intended to avoid have already occurred in the instant case and cannot be undone by dismissal at this stage of the proceedings. Consequently, we can see no justification for wasting the time and resources of the parties, the trial court and this Court by requiring Cheng to re-appeal at a later date. Nor do we view *Armstrong* as intending such a result.

strong v. *McAlpin*, slip op. 3693, 3723 n.26 (2d Cir. June 20, 1980) (although ABA committee that drafted Code has indicated rules were intended for use in disciplinary proceedings rather than in disqualification proceedings, Court refers to Code for guidance).

Canon 4 and its Ethical Considerations and Disciplinary Rules provide standards to guide an attorney in preserving the confidences and secrets of a client.[3] Cheng argues vigor-

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[3] *See* Canon 4, quoted in note 1, *supra*. The only Disciplinary Rule keyed to Canon 4 provides:

> DR 4-101 Preservation of Confidences and Secrets of a Client.
>
> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
>
> (C) A lawyer may reveal:
>
> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
>
> (2) Confidences or secrets when permitted under Disciplinary Rules or acquired by law or court order.
>
> (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
>
> (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his em-

ously that under these standards Gassel should be disqualified from representing GAF in the present action. Although Gassel is not actively involved in GAF's defense, his disqualification under Canon 4 would implicate the sweeping prohibition of representation by a tainted attorney's co-workers contained in Canon 5. Disciplinary Rule 5-105(D) provides: "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment." Although the district court below did not decide whether Gassel himself had to be disqualified under Canon 4, we must address this question briefly as it bears upon our analysis of Disciplinary Rule 5-105(D).

Determination of a violation of Canon 4 sufficient to disqualify an attorney traditionally has been based on a finding of concurrent or successive representation in the same or substantially related matters.

> [T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences

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ployees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

were disclosed to the attorney bearing on the subject matter of the representation.

T. C. Theatre Corp. v. *Warner Bros. Pictures*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953). It is well established that a court may not inquire into the nature of the confidences alleged to have been revealed to the tainted attorney. To require proof of access to privileged information would "put the former client to the Hobson's choice of either having to disclose his privileged information in order to disqualify his former attorney or having to refrain from the disqualification motion altogether." *Government of India* v. *Cook Industries, Inc.*, 569 F.2d 737, 740 (2d Cir. 1978). *See also Funds of Funds, Ltd.* v. *Arthur Andersen & Co., supra*, 567 F.2d at 235-36; *United States* v. *Standard Oil Co.*, 136 F. Supp. 345, 354 (S.D.N.Y. 1955) (Kaufman, J.) ("complaint need only show *access* to such *substantially related* material and the inference that defendant received these confidences will follow.") (emphasis in original). In the instant case, there is no dispute that the matters involved in Gassel's former association with Cheng are substantially related to his present association: the suit and the parties have remained the same throughout the proceedings. The only changing factor has been Gassel, who has moved from the plaintiff's firm to the defendant's firm, thus becoming subject to a disqualification challenge.[4]

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[4] In our recent decision in *Armstrong, supra*, we noted that "with rare exceptions disqualification has been ordered only in essentially two kinds of cases: (1) where an attorney's conflict of interests in violation of Canons 5 and 9 of the Code of Professional Responsibility undermines the court's confidence in the vigor of the attorney's representation of his client. . . . or more commonly (2) *where the attorney is at least potentially in a position to use privileged information concerning the other*

Appendix C

In *Silver Chrysler Plymouth Inc.* v. *Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975) (overruled on other grounds in *Armstrong* v. *McAlpin, supra*), we recognized that although there may be an inference that an attorney has knowledge of the confidences and secrets of his firm's clients, that inference is rebuttable. We also noted an earlier caution that the standard of proof to rebut this presumption should not become "unattainably high." *Id.* at 754, *quoting Laskey Bros. of W.Va., Inc.* v. *Warner Bros. Pictures*, 224 F.2d 824, 827 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956). *See also Government of India* v. *Cook Industries, Inc., supra*, 569 F.2d at 741 (Mansfield, *J.*, concurring). After considering the affidavits submitted by all parties in the instant case, including Gassel, Judge Owen assumed for the purposes of the motion that Gassel had been privy to some confidential disclosures, but he admitted that the extent of Gassel's exposure to the *Cheng* case through informal discussions or general strategy conferences had not been conclusively determined. Thus, the district court refrained from deciding whether Gassel had rebutted the presumption that he had obtained impermissible knowledge of Cheng's confidences and secrets. If we accept Judge Owen's assumption that Gassel was privy to those confidences, however, it is clear that Gassel would have to be disqualified under Canon 4 from representing

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side through prior representation, for example, in violation of Canons 4 and 9, thus giving his present client an unfair advantage . . . ."

Slip op. at 3718-19, *quoting Board of Education* v. *Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979) (footnote and citations omitted) (emphasis added). In the instant case, because the Epstein firm is defending the still pending suit brought on Cheng's behalf by LSEP, Gassel is potentially in a position to use Cheng's confidential information to Cheng's disadvantage.

Cheng's adversary in the identical proceedings.[5] *Government of India* v. *Cook Industries, Inc., supra,* 569 F.2d 737; *Fund of Funds, Ltd.* v. *Arthur Andersen & Co., supra,* 567 F.2d at 225; *Emle Industries, Inc.* v. *Patentex, Inc.,* 478 F.2d 562 (2d Cir. 1973).

Applying Disciplinary Rule 5-105(D), it appears that the Epstein firm should be disqualified as well. Judge Owen did not reach this conclusion, choosing instead to find that regardless of the extent of Gassel's knowledge, Cheng was adequately protected because Gassel had not yet divulged any confidences and was not inclined to do so in the future. We have considered the affidavits submitted to the district court and we conclude that there is ample support for Judge Owen's assumption that Gassel had been privy to Cheng's confidences, thus we find that under Canon 4 he would be disqualified from representing the defendant in the *Cheng* case. We next address Canon 5 and the screening procedures instituted to avoid disqualification of the Epstein firm.

II. *The "Chinese Wall" Defense*

Anticipating difficulties caused by a strict application of Disciplinary Rule 5-105(D), law firms have employed

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[5] The following allegations appeared in the affidavits submitted on Cheng's behalf: Gassel was personally introduced to Cheng; he "was present at and participated in several discussions with other LSEP attorneys and law students regarding the conduct, strategy, and facts of Mr. Cheng's case"; he discussed Cheng's communications with the representing attorney. Weiss affidavit at 4. These allegations were not challenged or refuted in any of the Epstein firm's affidavits; indeed, they appear also in the Epstein firm's brief on appeal. GAF brief at 3. It appears from the stipulated record on appeal that no additional evidence was before Judge Owen. Because we find that the affidavits demonstrate that Gassel did have knowledge of Cheng's confidences and secrets, we accept Judge Owen's assumption for purposes of this appeal.

various methods of screening a possibly tainted attorney from the rest of the firm's involvement in a particular case. The Epstein firm in the instant case cites the division of duties within its firm to demonstrate the height and thickness of the "Chinese Wall" they have constructed between Gassel and the *Cheng* case. They note in their affidavits that Gassel has been assigned to the health law division of their firm while GAF's defense is being handled by its labor division. The affidavits also aver that Gassel has not worked on the *Cheng* case, disclosed Cheng's confidences nor discussed the merits of the case while at the Epstein firm, and that the firm will not permit him to have any substantive involvement in the *Cheng* defense. Judge Owen accepted the Epstein firm's position, finding that the "risk of disclosure of confidential information is negligible." We take a different view of the potential for disclosure, keeping in mind that, as Judge Owen noted, one of the purposes of disqualification is "to guard against the danger of inadvertent use of confidential information," *Silver Chrysler Plymouth Inc.* v. *Chrysler Motors Corp.*, *supra*, 518 F.2d at 754, *quoting Ceramco, Inc.* v. *Lee Pharmaceuticals*, 510 F.2d 268, 271 (2d Cir. 1975).

Although Gassel may not be personally involved in the *Cheng* defense, he is a member of a relatively small firm.[6] The matter involved in his prior exposure to Cheng while at LSEP is still being actively pursued by attorneys for GAF at the Epstein firm. Despite the Epstein firm's protestations, it is unclear to us how disclosures, admittedly inadvertent, can be prevented throughout the course of this

[6] The Epstein firm's affidavit states that a total of 35 attorneys are employed in their New York and Washington, D.C. offices, with approximately 60 percent of the total located in the New York office where Gassel is an associate. Becker affidavit at 1.

representation. Unlike many disqualification motions that appear before this Court, here there exists a continuing danger that Gassel may unintentionally transmit information he gained through his prior association with Cheng during his day-to-day contact with defense counsel. *Compare NCK Organization, Ltd.* v. *Bregman, supra*, 542 F.2d 128, and *Hull* v. *Celanese Corp., supra*, 513 F.2d 568. *See also Government of India* v. *Cook Industries, Inc., supra*, 569 F.2d 737. If after considering all of the precautions taken by the Epstein firm this Court still harbors doubts as to the sufficiency of these preventive measures, then we can hardly expect Cheng or members of the public to consider the attempted quarantine to be impenetrable. Although we do not question Mr. Gassel's integrity or his sincere efforts to disassociate himself from the *Cheng* case, we are not satisfied that under the facts of this case the screening will be effective, thus we look to Disciplinary Rule 5-105(D) and order the district court to disqualify the Epstein firm.[7]

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[7] Although the Epstein firm urges that the result in this case should be controlled by our recent decision in *Armstrong, supra*, we find many factors distinguishing the two situations. In *Armstrong*, a former government attorney was concededly disqualified from private employment in a matter in which he had had substantial responsibility while employed by the Securities and Exchange Commission. This Court held that the attorney's law firm could continue representation where the tainted attorney was screened effectively.

In the instant case the tainted attorney is disqualified under Canon 4's commendable intent to protect a client's confidences and secrets, while in *Armstrong*, the attorney was disqualified under Disciplinary Rule 9-101(B), which forbids a lawyer to accept private employment in a matter in which he had substantial responsibility while a public employee. In *Armstrong* we noted the absence of a threat of taint of the underlying trial, and cited several policy reasons for approving the screening employed there. Primary among these reasons was a recognition that to disallow screening in all cases involving government attorneys might ham-

See Cinema 5, Ltd. v. *Cinerama, Inc., supra*, 528 F.2d at 1387, and cases cited therein. *See also Fund of Funds, Ltd.* v. *Arthur Andersen & Co., supra*, 567 F.2d at 229 n.10.

III. *Appearance of Impropriety*

Although we rest our holding on the clear direction in Disciplinary Rule 5-105(D), the result is compelled also by Canon 9's warning that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." In *Armstrong* v. *McAlpin, supra*, slip op. 3693, we cited the restrained approach to disqualification that had been adopted in *Board of Education* v. *Nyquist, supra*, 590 F.2d 1241, noting that where there is no danger that the underlying trial will be tainted, appearances of impropriety alone are insufficient to justify disqualification. Judge Owen, in his opinion below, also cited *Nyquist's* recommendation of restraint and concluded that it was "virtually assured" that the underlying trial in *Cheng* would not be tainted. We disagree. Such assurances would not seem to be possible in a situation such as this where Gassel is "potentially in

---

per the "government's efforts to hire qualified attorneys." Slip op. at 3716. In the instant case, by contrast, there *does* exist a threat of taint of the underlying trial, but there are no public policy reasons against disqualification as compelling as those involved in *Armstrong*. In addition, the tainted attorney's former employer in *Armstrong* agreed to the representation as long as proper screening techniques were used; here, Cheng and LSEP, Gassel's former employer, have objected to the representation since the Epstein firm hired Gassel. Finally, although the prejudice to the client separated from his attorney is also a factor, we must note that the prejudice to GAF caused by changing firms at this point is much less than the hardship that would have resulted from disqualification in *Armstrong*. "[S]eparating the receiver from his counsel at this late date will seriously delay and impede, and perhaps altogether thwart his attempt to obtain redress for defendants' alleged frauds." *Id.* at 3722.

a position to use privileged information," *Nyquist*, 590 F.2d at 1246, which he gained through his prior contact with the *Cheng* case. It is possible that, despite attempts by the Epstein firm to screen Gassel, the underlying trial could be tainted through GAF's inadvertent use of the unfair advantage it has over Cheng. This case presents, therefore, both the danger of tainting the underlying trial and the unacceptable appearance of impropriety condemned in Canon 9. *Cf. Emle Industries, Inc.* v. *Patentex, Inc., supra*, 478 F.2d at 565 (where public confidence in Bar would be undermined, "even an appearance of impropriety requires prompt remedial action by the court.").

Thus, it is clear that under Canon 9 as well as Canons 4 and 5, Gassel and the Epstein firm must be disqualified. Judge Owen's decision to the contrary was an abuse of discretion. Moreover, if there were any doubt as to the propriety of our action, we would resolve it in favor of disqualification. *Hull* v. *Celanese Corp., supra*, 513 F.2d at 571; *accord, Silver Chrysler Plymouth Inc.* v. *Chrysler Motors Corp., supra*, 518 F.2d at 757.

The order of the district court is reversed and the case is remanded for entry of an order of disqualification.

Pertinent Excerpts of the Relevant Decision of the United States District Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1508—September Term, 1980

(Argued: June 1, 1981 Decided: July 6, 1981)

Docket No. 81-7296

CHARLES GLUECK,

Appellant,

—v.—

JONATHAN LOGAN, INC.,

Appellee.

Before:

KAUFMAN and NEWMAN, *Circuit Judges,*
and GAGLIARDI,* *District Judge.*

Appeal from an order of the District Court for the Southern District of New York (William C. Conner, Judge), granting a motion to disqualify a law firm in a suit against a corporation, a division of which is a

* The Honorable Lee P. Gagliardi of the United States District Court for the Southern District of New York, sitting by designation.

strict standards of *Cinema 5* apply,[7] and we agree with Judge Conner that appellant has not sustained the heavy burden of demonstrating that, under those standards, disqualification can be avoided. The entry of an order of disqualification was well within the proper exercise of discretion by the District Court.[8] *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980), *vacated on other grounds and remanded*, 101 S. Ct. 1338 (1981); *Hull v. Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975). The order is affirmed.

---

7 We reject the appellant's contention that the result reached by Judge Conner is foreclosed by *Board of Education v. Nyquist, supra.* That decision concerned a lawyer who represented male teachers in litigation adverse to the interests of female teachers, under circumstances where the lawyer was supplied to the male teachers pursuant to a legal service program supported in part by the union dues of both the male and female teachers. A disqualification order was reversed for lack of any risk that the lawyer's loyalty to his male clients would be diminished or that he might gain unfair advantage through access to any privileged information from the female teachers. 590 F.2d at 1247.

8 We reject, as did Judge Conner, the appellant's contention that disqualification should not occur because Logan's division, R & K Originals, is a member of the Association, rather than Logan itself. The risks identified by Judge Conner are sufficient to warrant disqualification even though only Logan's division is a member of the Association. Nor do we accept the contention that it will be unduly burdensome for law firms that represent trade associations to inform themselves of the corporate identity of those members of an association that are constituent parts of a non-member corporation.

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APPENDIX E

Pertinent Excerpts of the
Relevant Decision of the Court
of Appeals for the Second Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
WILLIAM YARETSKY, et al.,

Plaintiffs,

- and -

MARY ROLEY, et al.,

Plaintiff-Intervenors, 76 Civ. 3360 (CBM)

- against -

BARBARA BLUM, et al.,

Defendants,

- and -

THE BRONX PROFESSIONAL STANDARDS
REVIEW ORGANIZATION, INC. et al.,

Defendant-Intervenors.
----------x

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CONSTANCE BAKER MOTLEY, D.J.

MEMORANDUM OPINION AND ORDER

Plaintiff has moved for disqualification of the law firm currently representing various organizations which have intervened in this action as defendants. For the reasons given below, the motion is granted.

Prior Proceedings and Factual Background

The facts relevant to this disqualification motion must be prefaced by a description of the somewhat involved procedural posture of this action. This case is a class action brought on behalf of all recipients of aid under New York State Plan for Medical Assistance To the Needy who are residents or patients of skilled nursing home facilities. Defendants are various state officials with responsibility for administering social services in New York State. The "intervenor-defendants" are four non-profit corporations established pursuant to the Social Security Act as professional standards review organizations (PSRO's), to monitor delivery of health care in long-term care nursing facilities. See U.S.C. §1320c-1 et seq.

On May 26, 1979, plaintiffs and defendants entered into a Stipulation of Consent to Partial Final Judgment (the Stipulation). On October 17, 1979, plaintiffs and defendants

entered into an Addendum Concerning Monitoring (the Addendum), which became part of the Stipulation. Together the Stipulation and the Addendum establish certain procedures governing the transfer of patients from a skilled nursing facility to a facility providing a lower standard of care. On that same day, October 17, 1979, this court ordered the entry of the Stipulation and Addendum as a partial final judgment.

On September 17, 1979, before entry of the Stipulation and Addendum as a partial final judgment, the four PSRO's who would subsequently become the intervenor-defendants entered into Memoranda of Understanding (MOU's) with defendants. These MOU's concerned review of long-term care, including care rendered in skilled nursing facilities. See 42 U.S.C. §1320c-20(a)(1). On March 25, 1980, plaintiffs moved this court for an order invalidating any MOU's

which did not contain procedures similar to those found in the Stipulation. Plaintiffs also sought to permanently enjoin defendants from entering into any future MOU's which did not contain the procedures set forth in the Stipulation and Addendum.

On April 16, 1980, the four PSRO's which entered into the disputed MOU's with defendants moved to intervene in this action. The motion to intervene was made as of right, and was unopposed. Plaintiffs then moved on May 1, 1980 for an order to declare the intervenor-defendants bound by the terms of the Stipulation and Addendum, as well as a permanent injunction prohibiting intervenor-defendants from entering into any future MOU's which did not contain the procedures found in the stipulation.

On June 9, 1980, this court filed a memorandum decision which: (1) declared the existing MOU's invalid, and (2) enjoined defendants from entering into any further MOU's with intervenor-defendants without

requesting incorporation of the terms contained in the Stipulation. The June 9, 1980, memorandum decision also explained this court's refusal to enforce the terms of the Stipulation against the intervenor-defendants, essentially because the PSRO's had not been party to any of the proceedings which resulted in the entry of a Partial Final Judgment embodying the terms of the Stipulation and the Addendum.

Since their entry into this action, intervenor-defendants have been represented by the law firm of Epstein, Becker, Borsody & Green (EBB&G). In October, 1979, EBB&G hired Phillip Gassel as an associate. During the period from October, 1974, until shortly before his employment with EBB&G, Mr. Gassel was a staff attorney at Legal Services for the Elderly Poor (LSEP). LSEP has served as one of the primary sources of legal counsel for plaintiffs since the inception of this lawsuit,

although they ceased to represent plaintiffs after Mr. Gassel went to EBB&G. While at LSEP, Mr. Gassel was directly involved in a very substantial fashion with the preparation for, and litigation of, this suit on plaintiffs' behalf.

...

Use of Privileged Information

In order to determine whether EBB&G must be disqualified, this court must first determine whether Mr. Gassel himself is disqualified from representing defendant-intervenors. The appropriate test to be applied has come to be known in this Circuit as the "substantially related" test. The phrase comes from an opinion by Judge Weinfeld of this court in a case where a lawyer was attempting to represent a client with interests adverse to those of a former client. Judge Weinfeld stated that:

> the former client [must] show no more than that the matters embraced within the pending suit wherein his former attorney appears . . . are substantially related to the matters or cause of action where the attorney previously represented him, the former client. The court will assume that during the course of the former representation, confidences were disclosed . . . Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule . . . be maintained.

T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268-269 (S.D.N.Y. 1953). This test has been consistently endorsed by the Second Circuit, and specifically applied in cases involving alleged access to privileged information derived from prior representation. See Fund of Funds, Ltd. v. Arthur Anderson & Co., 567 F.2d 225, 235 (2d Cir. 1977) (and case cited therein); Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973).

Preliminarily, defendant-intervenors suggest that this test is inapplicable because the privileged information allegedly possessed by Mr. Gassel, according to affidavits in support of this motion, was all derived from discussions with other lawyers from LSEP, rather than members of the plaintiff class. There is no support for this proposition, and the court rejects it. No satisfactory explanation is offered for why the considerations of Canon 4 should not apply with equal force to both information concerning legal theories and confidential information derived from direct contact with clients. Plaintiffs assert that Mr. Gassel was privy to all stages of development of this litigation. Defendant-intervenors now suggest that this type of information is somehow not "confidential" for purposes of Canon 4 because it was not derived from direct contact between Mr. Gassel and members of the plaintiff class. This

attempt to narrowly construe Canon 4 contravenes the spirit of the entire Code, and the dearth of support for such a position is easily understood.

Defendant-intervenors then assume, arguendo, the applicability of the "substantial relationship" test, but attempt to characterize it as a "rebuttable presumption." Intervenor-PSRO's Memorandum In Opposition to Plaintiff's Motion to Disqualify Counsel at page 20. According to defendant-intervenors, where "a matter [is] involved in the former and present representation" a rebuttable presumption arises that the attorney in question has received confidential information. The defendant-intervenors then seek to "rebut" this presumption by again pointing to the supposed distinction between information

about legal theories and negotiating positions in contrast to confidential information received directly from a client. They argue that since a significant amount of litigation and negotiation has already taken place, any advantage which might have resulted from Mr. Gassel's knowledge has already evaporated in the continuing contacts between the parties. This argument is both legally incorrect and factually unpersuasive.

First, the characterization of the "substantial relationship" test as a rebuttable presumption in incorrect. The presumption that confidential information has been received is not rebuttable. The whole point of Judge Weinfeld's formulation, subsequently adopted by the Second Circuit, is that "the former client" need "show no more than" a substantial relationship between the matters involved in the former and present actions. Once this relationship is shown, "[t]he Court will

assume that during the course of the former representation confidences were disclosed." Fund of Funds, Ltd. v. Arthur Andersen & Co., supra, 567 F.2d at 235 (quoting T.C. Theatre Corp. v. Warner Bros. Pictures, supra, 113 F. Supp. at 268-69). (emphasis added). Here Mr. Gassel has switched sides in the same lawsuit. The matters on plaintiffs' side of this lawsuit are clearly substantially related to the matters on defendants' side of this lawsuit.

Even if defendant-intervenors' interpretation of the "substantial relationship" test were correct, their attempts to rebut the presumption they have created are not persuasive on the instant facts. In a supporting affidavit, one of plaintiffs' counsel gives a detailed description of the types of information in Mr. Gassel's possession. See Affidavit of John E. Kirklin at ¶¶ 5 and 6. For instance, plaintiffs make the uncontested assertion that

Mr. Gassel was "primarily responsible for developing the expert statistical testimony on which plaintiffs intended to rely at trial." Id. Moreover, Mr. Gassel is credited with intimate knowledge concerning plaintiffs' future litigation strategy and plaintiffs' understanding of the consent judgment. Defendant-intervenors' position requires this court to accept that an opposing party's interpretation of a disputed court order is not confidential information when the parties are even now negotiating over how the disputed court order is to be applied. Defendant-intervenor position is factually unsupportable.

However, Mr. Gassel's assumed possession of confidential information, and his resulting personal disqualification do not end the court's inquiry. The question then becomes whether Mr. Gassel's disqualification requires the disqualification of the firm with which he is associated, EBB&G. As previously mentioned,

the Second Circuit has regularly referred to the American Bar Association Code of Professional Responsibility (Code) for standards to apply in dealing with disqualification motions. The Code speaks unequivocally about the situation now facing this court in Disciplinary Rule 5-105(D):

> If a lawyer is required to decline employment or withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment."

Since Mr. Gassel himself is clearly disqualified from representing the defendant-intervenors, application of Disciplinary Rule 5-105(D) is obvious here.

However, defendant-intervenors have properly argued against a mechanical application of DR 5-105(D). They point to a number of situations in which the American Bar Association has decided against disqualification of an

entire law firm simply because a single associate or partner has been disqualified. See, e.g., ABA Formal Opinion 342, 62 ABA Journal 517 (1976), ABA Opinion No. 889, 31 The Record 552 (1976). These decisions are based upon screening procedures designed to insulate the disqualified individual from any contact with the particular matter at issue while it is being handled by other members of the firm. In this case, EBB&G has given the court a detailed description of the efforts now being made to screen Mr. Gassel from any contact with this case. These efforts include isolating him from conversations and communications involving this matter, as well as locking up all files generated by the case. At this point the court feels it is appropriate to state that plaintiffs have not even suggested any deliberate attempt or propensity on Mr. Gassel's part to deliberately communicate confidential information. Accordingly, prevention of such an occurrence plays no part in this decision.

Nevertheless, despite Mr. Gassel's unimpeached good character and the screening efforts undertaken by EBB&G, the court finds that on the particular facts of this case EBB&G must be disqualified. As the Second Circuit has stated, disqualification of counsel is prompted by the "need to enforce the lawyer's duty of absolute fidelity and to guard against the danger of inadvertent use of confidential information." Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975). In the instant case, the law firm involved has less than thirty lawyers in its New York office. Moreover, Mr. Gassel is employed in the firm's health law section, which is also the section of the firm charged with handling this case. In other words, the relatively small group of professional colleagues with whom Mr. Gassel interacts on a daily basis are also the group of people who must screen their activities

from Mr. Gassel, and who must, in turn, be screened from Mr. Gassel's disclosure, however inadvertent, of confidential information obtained by him during his tenure as an LSEP attorney. This court is very skeptical about the efficacy of any screening procedures given this situation. The court notes that its skepticism is shared by at least one panel of judges in the Second Circuit in the context of a law firm substantially larger than EBB&G. See Fund of Funds, Ltd. v. Arthur Anderson & Co., 567 F.2d 225, 229 n.10 (2d Cir. 1977).

In addition, the very extent to which Mr. Gassel was involved in this case on the other side while at LSEP makes his screening virtually impossible at this stage. For instance, a dispute broke out between plaintiffs and defendants concerning certain conversations which were alleged to have taken place between the parties. At the request of plaintiffs' counsel, Mr. Gassel prepared an

affidavit about a conversation he had with defendants' counsel while he was employed at LSEP. Mr. Gassel prepared the affidavit with EBB&G's permission. In the same vein, it is certainly not impossible that Mr. Gassel could be called as a witness should this matter result in further litigation. Each of these situations has, or would, force contact between Mr. Gassel and EBB&G lawyers in the context of discussing this case. Surely no "Chinese Wall" could survive such an assault.

The Appearance of Impropriety

As this court reads the applicable law of the Second Circuit, the appearance of impropriety in violation of Canon 9 would not, standing alone be sufficient to require disqualification. See Board of Education v. Nyquist, supra, 590 F.2d 1241. Clearly this position is motivated by solicitude for a party's right to choose his own counsel, and an appreciation of the dislocation caused by disqualifying counsel

once an action has begun. However, these considerations must be balanced with "the need to maintain the highest standards of the profession." Government of India v. Cook Industries, Inc., 569 F.2d 737 (2d Cir. 1978). These standards take on practical importance in preserving the public's confidence in the legal profession. See Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 565 (2d Cir. 1973). This court would be hard pressed to explain to a lay person how it was in fact proper for a lawyer who was substantially involved with the prosecution of a lawsuit to switch sides in the middle of the action. The appearance of impropriety is incontrovertible on the instant facts, and serves as an important additional reason for disqualification of EBB&G.

...

Opposition

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No. 81-975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES K. J. CHENG,

Petitioner,

-against-

GAF CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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December, 1981

(11801)

Counterstatement of Question Presented

Should the Court of Appeals for the Second Circuit have granted the extraordinary relief of mandamus to compel the District Court to disqualify defendant's law firm where the firm utilized screening procedures to insulate from the case an attorney who previously worked for the legal services organization representing plaintiff and where no showing was made to the District Court that continued representation of defendant by the law firm was in fact prejudicial to plaintiff?

TABLE OF CONTENTS

	PAGE
Counterstatement of Question Presented	i
Counterstatement of the Case	1
Summary of Argument	4
REASONS FOR DENYING THE WRIT—	
I. Review of This Case Would Not Serve to Settle Any Question of General Importance	4
II. The Denial of Mandamus by the Court of Appeals Was Not a Departure from Prior Cases in the Second Circuit	6
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 5, 6

Board of Supervisors v. Tureaud, 226 F.2d 714 (5th Cir. 1955) 7

Cheng v. GAF Corp., 631 F.2d 1052 (2d Cir. 1980) ... 6

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) 3, 5, 6n.7, 7n.8

GAF Corp. v. Cheng, 101 S. Ct. 1338 (1981) 3, 7

Jordon v. Gilligan, 500 F.2d 701 (6th Cir. 1974) 7

O'Connor v. Donaldson, 422 U.S. 563 (1975) 7

Will v. United States, 389 U.S. 90 (1967) 6

Yaretsky v. Blum, 76 Civ. 3368 (S.D.N.Y. Apr. 28, 1981) 7

Statutes and Rules:

ABA Code of Professional Responsibility 3

Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* 1

Civil Rights Act of 1866, 42 U.S.C. § 1981 1

Fed. R. App. P. 21(b) 4n.6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES K. J. CHENG,

Petitioner,

-against-

GAF CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Counterstatement of the Case

From October 1974 until October 1979, Philip M. Gassel ("Gassel") was employed as an attorney by Legal Services for the Elderly Poor[1] ("LSEP"), attorneys for petitioner James K.J. Cheng ("Cheng"). LSEP was at all relevant times a state and federally funded legal services organization specializing in legal problems of the elderly. During the period of Gassel's employment, LSEP employed from four to six attorneys, assisted by several part-time law students.

On June 29, 1977, Cheng commenced this action alleging that respondent GAF Corporation[2] ("GAF") violated the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. While at LSEP, as Cheng's counsel has contended herein, Gassel was present at certain "informal" discussions with various LSEP staff regarding, among other things, the conduct of any number of LSEP

[1] Legal Services for the Elderly Poor became Legal Services for the Elderly on May 1, 1980.

[2] GAF has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates.

cases of which Cheng's case was one, and was exposed to unspecified confidential information. However, as conceded by Cheng's counsel, at no time did Gassel represent Cheng in any capacity. He undertook no research, prepared no pleadings, motion papers, memoranda or correspondence of any kind, nor did Gassel ever confer with Cheng with regard to the prosecution of this case.

The firm of Epstein Becker Borsody & Green[3] (the "Epstein Firm") hired Gassel as a senior associate in October 1979 for its health law department because of his expertise in that substantive area. At that time, this action had been pending over two years. The defense of the case was originally undertaken by Ronald Michael Green, then a member of another law firm, who, upon joining the Epstein Firm in August 1978, continued supervising GAF's defense as head of the Epstein Firm's labor law department. This case, as it is an employment discrimination matter, was initially assigned to the Epstein Firm's labor law department, which has handled it exclusively to this date. When Gassel was first employed, the Epstein Firm had some thirty-five attorneys with New York City and Washington, D.C. offices.[4] At all relevant times, the Epstein Firm has had only two major areas of specialization, labor law and health law. Attorneys are permanently assigned to one of these two areas of specialization on a full-time basis due to the high degree of substantive expertise necessary to adequately represent clients in those areas. Staff meetings are held separately for each specialty. Gassel was assigned to the health law department at the commencement of his employment with the Epstein Firm and has remained continuously with that department.

Since the inception of Gassel's employment, the Epstein Firm has maintained a "Chinese Wall" between him and the handling of this case. Gassel has had no involvement with this case whatsoever, other than filing factual affidavits with the District

---

[3] Epstein Becker Borsody & Green became Epstein Becker Borsody & Green, P.C. on July 1, 1980.

[4] The Epstein Firm has now grown to nearly sixty attorneys and added offices in Fort Worth, Texas and San Francisco, California.

Court solely with regard to Cheng's disqualification motions, and has not been privy to any discussions regarding the merits, defenses, tactics or strategies of the case. He is not permitted to work on the case. Gassel has divulged no confidential information to the Epstein Firm, has never been requested to do so, nor would he do so. Cheng and his counsel have considered Gassel's integrity above suspicion.

On January 25, 1980, Cheng moved to disqualify the entire Epstein Firm on the grounds that its continued participation in the action violated the ABA Code of Professional Responsibility. On March 14, 1980, the District Court for the Southern District of New York denied the motion, concluding that under the circumstances presented, disqualification "would not serve any interest which the law recognizes." At the time the motion was decided, substantial discovery over a period of approximately two years, including numerous depositions, interrogatories and document requests, as well as extensive legal research and other pre-trial preparation, had been completed and GAF had already incurred considerable legal expenses.

On August 26, 1980, the Court of Appeals for the Second Circuit reversed the decision of the District Court, finding that, despite the Epstein Firm's screening procedures, it was "unclear to us how disclosures, admittedly inadvertent, can be prevented throughout the course of this representation." The case was remanded to the District Court for entry of an order of disqualification. GAF, after unsuccessfully petitioning for rehearing, then filed a petition for a writ of certiorari with this Court.

By order dated February 23, 1981, the Court granted certiorari and summarily vacated the judgment of the Court of Appeals for the Second Circuit with instructions that Cheng's appeal be dismissed (for want of jurisdiction) pursuant to *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981). *GAF Corp. v. Cheng*, 101 S. Ct. 1338 (1981). Thereafter, Cheng moved before the Second Circuit to have his appeal deemed a petition for a writ of mandamus. The motion was denied.

On May 12, 1981, Cheng moved to renew his original disqualification motion although there were no new facts pre-

sented to the District Court. The court denied the motion on July 1, 1981 without prejudice to its later renewal should it appear that "permitting continuing representation was [in fact] prejudicial" to Cheng. *See* Appendix B of Petition.[5] Cheng then petitioned the Second Circuit for a writ of mandamus. On September 29, 1981, the Second Circuit denied the petition.[6] *See* Appendix A of Petition. Cheng's petition for a writ of certiorari followed. The merits of the case have effectively been stalled for the nearly two years which have elapsed since Cheng's initial disqualification motion.

Summary of Argument

The petition for a writ of certiorari should be denied for the following reasons:

1. Review of this case would only determine the narrow question of the use of the extraordinary relief of mandamus in an attorney disqualification dispute turning on the particular facts of a law firm's screening methods. The case is not of general importance.

2. The denial of mandamus by the Court of Appeals of the Second Circuit did not represent a departure from sound precedent.

REASONS FOR DENYING THE WRIT

I.

Review of This Case Would Not Serve to Settle Any Question of General Importance.

Cheng's vaguely worded reasons for requesting the writ appear as follows:

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[5] Refers to Cheng's petition for a writ of certiorari.

[6] The court did not require that an answer be filed prior to denying the petition. *See* Fed. R. App. P. 21(b).

> Mr. Cheng urges this Court to grant his Petition for Certiorari and direct that Mandamus issue to give concrete illustration and guidance concerning the practical application of footnote thirteen [of *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. at 378-379] and obtain justice for himself and instructions to lower Federal Courts as to the utilization of Mandamus in disqualification cases.

Petition at 6.

More precisely stated, Cheng wants the Court to determine whether mandamus should have issued to disqualify attorneys in a case principally turning on the efficacy of the Epstein Firm's screening procedures.

The availability of mandamus in attorney disqualification matters was discussed in *Firestone:*

> In the proper circumstances, the moving party may seek sanctions short of disqualification, such as a protective order limiting counsel's ability to disclose or to act on purportedly confidential information. If additional facts in support of the motion develop in the course of the litigation, the moving party might ask the trial court to reconsider its decision. Ultimately, if dissatisfied with the result in the District Court and absolutely determined that it will be harmed irreparably, a party may seek to have the question certified for interlocutory appellate review pursuant to 28 U.S.C. §1292(b), see n. 7, *supra*, and, in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals might be available.

449 U.S. at 378-379 n. 13.

Mandamus, as the Court pointed out, is confined to "exceptional circumstances." The meaning of this phrase was previously well summarized in *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980). The Court reiterated its view that

although a simple showing of error might suffice to obtain a reversal on direct appeal, to issue a writ of mandamus under such circumstances would undermine the settled limitations upon the power of an appellate court to review interlocutory orders. Only exceptional circumstances, amounting to a judicial usurpation of power, would justify invocation of the extraordinary remedy of mandamus. *Will v. United States*, 389 U.S. 90 (1967). A party seeking mandamus must have no other adequate means to attain the relief he desires and show that his right to issuance of the writ is clear and indisputable. *Allied Chemical*, 449 U.S. at 35.

The application of the "exceptional circumstances" doctrine to the necessarily varied fact patterns and ethical considerations of attorney disqualification disputes does not lend itself to generalization and must proceed on a case-by-case basis. This case involves law firm screening procedures. Considerations germane to the effectiveness of such procedures include, *inter alia*, the size of the firm, the methods employed to achieve screening, and proof of possession of confidential information by the attorney subject to screening. The question presented in this case involves a unique set of facts, is not of general importance,[7] and thereby does not warrant review by this Court.

II.

The Denial of Mandamus by the Court of Appeals Was Not a Departure from Prior Cases in the Second Circuit.

Cheng's overemphasis on the merits of the case may be dealt with briefly. Whatever consolation he may gain from the decision of the Court of Appeals for the Second Circuit (reported at 631 F.2d 1052) which was vacated by this Court's summary

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[7] The *sui generis* nature of this case precluding uniform application contrasts with the cases cited (without explanation) in the footnote of Cheng's Petition at 6. As the Court noted in *Firestone*, "The decision whether to disqualify an attorney ordinarily turns on the *peculiar factual situation* of the case then at hand. . . ." 449 U.S. at 377 (emphasis added).

order, *GAF Corp. v. Cheng*, 101 S. Ct. 1338 (1981), that decision of the Second Circuit has no precedential value. *O'Connor v. Donaldson*, 422 U.S. 563, 577 n. 12 (1975). It has no legal effect whatsoever. *Jordon v. Gilligan*, 500 F.2d 701 (6th Cir. 1974); *Board of Supervisors v. Tureaud*, 226 F.2d 714 (5th Cir. 1955).

Cheng's reference to *Yaretsky v. Blum*, *see* Appendix D of Petition, is not on point. A major ground for disqualification in that case was the possibility that the subject attorney could be called as a witness in the litigation, a factor not present here.

Finally, it should be mentioned that Cheng made *no* attempt to follow any procedure suggested in footnote 13 of *Firestone* which would have entailed relief short of disqualification. When faced with the renewed disqualification motion, the District Court for the Southern District of New York implicitly found no evidence of actual prejudice to Cheng and declined to order the drastic relief sought. Likewise, the Court of Appeals for the Second Circuit implicitly found no exceptional circumstances required to invoke mandamus.[8]

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[8] "The propriety of the district court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is normally only after final judgment." *Firestone*, 449 U.S. at 377.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,
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December, 1981